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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

DIANE SKOLNIQUE et al., Petitioners and Appellants, v. COLDWELL BANKER RESIDENTIAL BROKERAGE et al., Defendants and Respondents.	B214198 (Los Angeles County Super. Ct. No. BP092873)

APPEAL from a judgment of the Superior Court of Los Angeles County. Aviva Bobb, Judge. Affirmed.

Schwartz & Fenster and Howard J. Ettinger for Petitioner and Appellant Diane Skolnique.

Law Offices of Craig J. Englander and Craig J. Englander for Petitioner and Appellant Amit Women (Batyh Chapter).

Klinedinst PC and Neil R. Gunny for Defendants and Respondents.

INTRODUCTION

This appeal is from a summary judgment. The issue on appeal concerns the standing of appellants as residuary beneficiaries of a trust to challenge the actions of respondents as agents of a successor trustee. Appellants assert that they did not have the benefit of two Second Appellate District opinions which are directly contrary to the decision of the trial court thereby requiring a reversal. As hereafter explained, we affirm finding no error by the trial court.

FACTUAL AND PROCEDURAL SYSNOPSIS

Harold Skolnick (Harold) died on June 12, 2005, in Los Angeles, California. At the time of his death, Harold had a trust entitled the Harold Skolnick Family Trust (Trust). Harold was the settlor of the trust. Appellants, Diane Skolnique and Amit Women (Batyh Chapter),[1] were the residual beneficiaries of the trust. Successor trustee was one Arthur Brown (Brown).

At the time of Harold's death, the trust res included four parcels of real estate located in Los Angeles County and generally described as the Roxbury properties, located at 1120 and 1128 Roxbury, the Reeves property located at 153 Reeves, and the Spalding property located at 318 Spalding.

Brown retained the services of Coldwell Banker Residential Brokerage Company (Coldwell) and one of its real estate agents, Samuel Fox (Fox), to assist Brown in selling the four properties. Although Brown retained Fox prior to July 11, 2005, beneficiaries assert that Fox did nothing to sell the properties until on or about September 26, 2005, at which time Brown and Fox executed separate probate listing agreements.

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[1] For convenience, the residual beneficiaries will hereafter be referred to as "beneficiaries" unless context requires otherwise.

The probate listing agreement for the 1120 Roxbury property stated the property would be listed in the multiple listing service with a listing price of $1.25 million. The probate listing agreement for 1128 Roxbury provided that it would be included in the multiple listing service but at a listing of $1.5 million. Beneficiaries maintain that neither property was ever listed in the multiple listing service. Instead, both properties were sold to Lenmar Companies, LLC (Lenmar) for the exact listing price. The principal owner of Lenmar is a man named Marvin Markowitz (Markowitz) whom Fox identified in his deposition as a man Fox knew from the time Markowitz was 15 years old and that Fox dined at the restaurant owned by the Markowitz family.

Pertaining to the Reeves property, Brown and Fox also signed a probate listing agreement dated September 26, 2005, which again provided that the property would be listed in a multiple listing service. Beneficiaries again maintain that the property was not so listed and that no efforts were made to market the property. Fox, however, did obtain an offer from a Dr. Stephen Copen and his wife on the same day that the probate listing agreement was signed. Dr. Copen was Harold's doctor and Fox met Dr. Copen while visiting Harold in the hospital. The Copens made an offer on the property for $1.65 million. The sale of the Reeves property to the Copens did not go forward. While the sale was in escrow the Copens backed out of the sale, but before this happened Fox received a call from a former client by the name of Manny Saltzman. A few days after the Copens backed out of the sale, Fox obtained an offer from Saltzman for $1.34 million resulting in a decrease of $310,000 from the offer Fox had received from the Copens a few weeks earlier. At the time of the Saltzman offer, the Reeves property had never been listed in the multiple listing service and had never been exposed to the market. Brown accepted the Saltzman offer and then agreed to give Saltzman a $40,000 allowance in lieu of repairs. The net sales price to Saltzman was $1.34 million.

Brown and Fox also signed a probate listing agreement for the Spalding property on September 26, 2005. The listing price was to be $2 million for a multiple listing. No marketing of the property occurred and there was no multiple listing. On November 17, 2005, Brown and Fox signed a second probate listing agreement and the listing price was raised to $2.245 million, resulting in an increase of $245,000, from the initial probate listing agreement. Responding to an offer on or about January 19, 2006, Fox sold the property for $1.9 million.

One Larwin Lewin, not knowing that the properties had been sold and acting on behalf of beneficiary, Amit Women, inquired about the sales price of the properties. He contacted a very old friend, Diane Manns, who was married to one of Lewin's former law partners who worked at the same Coldwell office as Fox and was in fact Fox's supervisor. Ron Losch from that same office acquired the property values for Lewin. Having acquired information about the values of the properties, Losch sent a facsimile to Lewin on June 14, 2006, opining as follows: "The [Spalding] duplex maybe sold for $100,000 under market. . . . Roxbury should have been $1.75 each at the least, being a double lot really increases the value. The Reeves building had great curb appeal [and] I would think 1.9 would be correct." The properties sold for prices totaling $1.4 million less than their fair market values.

On January 26, 2009, judgment was entered against the beneficiaries in favor of Coldwell and Fox. The beneficiaries filed a timely notice of appeal on February 13, 2009.

DISCUSSION

At the outset, we note that there is no dispute about the fact that beneficiaries were and are not the clients of respondents. Further, there is no dispute that respondents made no representations to the beneficiaries about the real estate sale of the four properties contained in the trust assets. The dispute is whether or not beneficiaries can state a cause of action against respondents based on the naked fact that the beneficiaries are residuary

beneficiaries of the trust. Further, there is no dispute that this court is bound by a de novo standard of review as a matter of law.

The answer to this question requires this court to examine the general principles set forth in the seminal decision of the California Supreme Court in *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370. Admittedly, the facts in *Bily* are distinguishable from the facts in this case. However, the basic principles set forth in *Bily* are apt and instructional. In *Bily*, the Supreme Court reversed the appellate court for its decision finding that investors could state a cause of action against an auditor of business records for negligence. The Supreme Court held that the trial court erred in entering judgment for plaintiff on the professional negligence count since an auditor can be held liable for general negligence in conducting an audit of financial statements only to the person or entity contracting for the auditor's services, and the accounting firm's sole client was the company. The court further held that although an auditor may not be held liable to third parties for general negligence, an auditor my be held liable for negligent misrepresentation to third parties who are known to the auditor and for whose benefit the auditor has rendered the audit report. The court further held that an auditor may also be held liable to third parties for intentional fraud in false statements made in the audit report when made recklessly, even though the auditor may not have had actual knowledge of the false or baseless character of its opinions.

The general principles set forth in *Bily* should cause this court to be cautious in considering the universe of third parties to which a duty is to be extended. It is particularly evident that beneficiaries were not clients of respondents and indeed had no contact with respondents until beneficiaries chose to challenge the actions of respondents after the sale of the properties took place. Further, it is undisputed that the misrepresentation element of a cause of action for negligent misrepresentation is missing in this instance and no fraud or reckless behavior has surfaced. We are therefore constrained to hold that general principles set forth in *Bily*, when applied to the facts of this case, require a disposition in favor of respondents and a subsequent affirmance of the judgment of the trial court.

Before reaching our disposition, however, we examine beneficiaries' claims that application of two recent Court of Appeal decisions would require a reversal of the judgment of the trial court.

Estate of Bowles (2008) 169 Cal.App.4th 684, cited by beneficiaries, does appear to offer some support for their assertion that the trial court should be reversed on the standing issue, but we find the *Bowles* decision to be distinguishable. In *Bowles* a trust beneficiary alleged that buyers induced the trustee to sell trust property for less than its fair market value, to make risky and imprudent loans and investments of trust funds that benefited the buyers, and to give the buyers trust assets to which they were not entitled. The Court of Appeal for the Second Appellate District, Division Five, reversed the judgment of dismissal of the civil action holding that it was error to dismiss the complaint for lack of standing. It is clear, however, that the third party buyers were actively involved in the wrongful taking of trust property from the trustee. In this case, the third parties never had any contact with the trustees but dealt only with an agent of the trustees in listing the various properties for sale. This would constitute an expansion of the universe of third parties to which a duty would be imposed in dereliction of the precautionary general principles set forth by our Supreme Court in *Biley*, in our opinion.

Our opinion in *Chang v. Lederman* (2009) 172 Cal.App.4th 67 is of no solace to beneficiaries, although the opinion was decided unanimously by this division. In *Chang* the central issue on appeal involved standing to sue when a plaintiff was not included as a beneficiary in decedent's estate plan even though the widow alleged that the decedent had instructed the attorney to revise his trust and will to leave his entire estate to her and that the attorney breached his duty of care to her by refusing and failing to do so. In affirming the decision of the trial court, this division held no such duty existed when the testator intended to include a bequest and would have done so but for the attorney's negligence. This court held that recognizing a duty of care under such circumstances would impose an undue burden on the profession. We note that this decision is well in keeping with the principles set forth by the California Supreme Court in *Bily*. We do not

intend, by this opinion, to imply beneficiaries lack standing to bring an appropriate action against the successor trustee for breach of trust duties.

DISPOSITION

The judgment is affirmed. Respondents to recover costs of appeal.

WOODS, J.

We concur:

PERLUSS, P. J.

JACKSON, J.